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Docket No. T-00000A-97-0238

Arizona Corporation Commission

DOCKETED

JUN 14 1999

BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE U S WEST
COMMUNICATIONS, INC.'S
COMPLIANCE WITH SECTION 271 OF
THE TELECOMMUNICATIONS ACT OF
1996

U S WEST'S REPLY TO ACI'S RESPONSE TO U S WEST'S MOTION TO COMPEL
RESPONSES FROM ACI TO DATA REQUESTS

DOCKETED BY

U S WEST Communications, Inc. ("U S WEST") submits this reply to ACI's Response to
U S WEST's motion to compel supplemental responses to the Attachment A and B Data Requests.

I. INTRODUCTION

Far from pursuing a "scorched node" approach to discovery, as ACI dramatically exclaims,
U S WEST filed its motion to compel seeking supplemental information on a limited number of
Data Requests. ACI represents in its response that ACI has no further information regarding
Attachment B Data Requests 3 through 8 and 10 through 14, and has produced all relevant material
in ACI's possession regarding the Attachment B Data Requests and the checklist items these
requests cover. U S WEST will accept ACI's representation, and expects ACI to stand by it.

Accordingly, U S WEST's reply focuses on the Attachment A Data Requests at issue,
particularly Data Requests 3 and 5. With respect to these requests, the Hearing Division should
compel ACI to supplement its response and produce documents relating to the Data Requests.

1 **II. DISCUSSION**

2 **A. The Hearing Division Should Compel ACI to Supplement Its Response to**
3 **Data Request 3 of Attachment A.**

4 ACI's principle objection to U S WEST's motion to compel further responses to the
5 Attachment A Data Requests is that ACI does not believe the information U S WEST seeks is
6 relevant. The Hearing Officers, however, have already rejected that argument in requiring all
7 parties to respond to the Attachment A Data Requests regarding "General Telecommunications
8 Market Conditions in Arizona." See Transcript of April 2, 1999 at 63. If ACI believed that
9 information regarding its market entry plans is irrelevant, the time to raise that objection was at
10 the hearing on U S WEST's original motion to compel when the Hearing Officers directed the
11 parties to respond to the Attachment A and B Data Requests. Having remained silent, ACI
12 cannot now raise its relevancy arguments.

13
14 Regardless, ACI's relevancy objection is meritless. ACI's Arizona market plans are
15 obviously relevant to determining "general telecommunications market conditions in Arizona."
16 Furthermore, this information is relevant to whether U S WEST meets the Track A requirements
17 of Section 271, determining ACI's reasonably foreseeable demand for checklist items and OSS
18 access, and whether granting U S WEST's application is in the public interest under Section
19 271(d)(3)(C).

20 ACI disputes that its market entry plans are relevant because U S WEST bears the burden
21 of proving that its application should be granted and must demonstrate that it is presently able to
22 meet CLECs reasonably foreseeable demand for checklist items. ACI Response at 2-3.
23 U S WEST acknowledges that it has the burden of proving its entitlement to Section 271 relief.
24 Indeed, it is because U S WEST has the burden of proof that it seeks discovery from the parties
25
26

1 to support its application and prepare to respond. That U S WEST has the burden of proof is
2 simply irrelevant to ACI's discovery obligations. ACI's argument that discovery is unavailable
3 or limited for a party that has the burden of proof has been soundly and repeatedly rejected. For
4 example, in *Piscatelli v. IRS*, 64 T.C. 424 (June 16, 1975), the court rejected this argument as
5 bordering on frivolous:
6

7 Petitioner's first contention is that because the respondent bears the burden
8 of proving fraud he cannot discover relevant and nonprivileged information. We
can only say that this argument borders on the frivolous.

9 *Id.* at 4. The United States Supreme Court has held likewise. *Konigsberg v. State Bar of*
10 *California*, 366 U.S. 36, 55 (1961) ("[r]equiring a defendant in a civil proceeding to . . . submit
11 to discovery has never been thought to shift the burden to him").
12

13 It is incumbent upon all parties to answer discovery, irrespective of which party has the
14 burden of proof:

15 [Defendant] maintains that requiring it to answer the interrogatories
16 improperly shifts the burden of proof to it. We believe that defendant has entirely
17 mischaracterized the consequences of requiring it to respond to interrogatories.
The issue is not one of burden of proof. Rather, . . . [defendant] may be required
to specify the extent and bona fides of its claims.

18 *Maryland Casualty Co. v. Grace & Co.-Conn*, 1995 U. S. Dist. LEXIS 9337 (S.D.N.Y.
19 1995). That is exactly what U S WEST seeks to accomplish: to ensure that U S WEST collects
20 all of the information that best allows it to present "the bona fides of its claims" and to ensure
21 that ACI's assertions are based on fact, not mere allegations.
22

23 Similarly, U S WEST recognizes that FCC orders require BOCs to demonstrate that they
24 are presently (i.e., at the time of the FCC application) able to meet the reasonably foreseeable
25 demand for checklist items. See ACI Response at 2. However, U S WEST cannot demonstrate,
26

1 and the Commission cannot assess, the U S WEST is able to meet that reasonably foreseeable
2 demand “presently” unless U S WEST knows which carriers are in the market, when they will be
3 in the market, and what their reasonably foreseeable demand may be. Accordingly, the
4 information U S WEST seeks regarding Data Request 3 is highly relevant to this proceeding and
5 discoverable.

6
7 Finally, ACI asserts that U S WEST should not expect a “particularly voluminous
8 production” from ACI. ACI Response at 3. ACI, however, produced no documents relating to
9 the topic of Data Request 3 or its response. The Hearing Officers clearly ordered all parties to
10 produce documents relating to the Data Requests and the party’s responses. See Transcript of
11 April 2, 1999 at 67-68 (“Mr. Steese: . . . One caveat. To the extent the companies have
12 documents that relate to these [Data Requests], they’re supposed to produce them as well. Even
13 though [the Data Requests] don’t specifically request documents, I want to make sure these
14 overlay with the request to documents, that they relate to matters of concern. Hearing Officer
15 Rudibaugh: Again, that is appropriate . . .”) (emphasis added). In its response to Data Request 3,
16 ACI asserts that it has plans to enter the Arizona market by the fourth quarter of 1999 and
17 provide residential and business exchange service. Exhibit 1 to U S WEST Motion to Compel.
18 U S WEST expects that ACI, like any business, would have some documents relating to that
19 intention.
20

21
22 **B. The Hearing Divisions Should Compel ACI to Supplement its Response to**
23 **Data Request 5 of Attachment A.**

24 ACI also objects to U S WEST’s attempts to obtain discovery regarding “eight separate
25 fields of information about ACI’s future plans” in response to Data Request 5. ACI Response at 3.
26 These “eight separate fields,” however, are the Data Request 5 subparts (a)-(h) that the Hearing

1 Officers ordered all parties, regardless whether they are currently in the market, to answer. As
2 noted above, the Hearing Officer also ordered all parties, including ACI, to produce documents
3 related to the Data Requests.

4 As set forth in U S WEST's motion to compel, ACI admits that it intends to enter the
5 Arizona market as soon as the end of this year, but produces no documents whatsoever relating
6 to nay of the topics in Data Request 5. Any company about to enter a new market should have
7 information and, most important, documents (beyond collocation requests) relating to the
8 geographic area it intends to serve (Data Request 5(c)), the number and types of customers it
9 intends to serve (Data Request 5(d)), the types of facilities it intends to provide itself and those it
10 intends to purchase from U S WEST (Data Request 5(e)), and ACI's build-out and expansion
11 plans (Data Request 5(g)). The documents, maps, plans, and information at issue in the Data
12 Requests are routine business documents for telecommunications carriers of any size.

13
14
15 As ACI's description of its service plans in its response to U S WEST's motion to compel
16 demonstrates, ACI Response at 4, ACI has formed plans and made decisions regarding issues
17 covered by Data Request 5 of Attachment A. For example, ACI states that it will provide service
18 to support "corporate offices and telecommuting employees of ACI's business customers." ACI
19 Response at 4. ACI also states that it will use some combination of U S WEST unbundled
20 network elements and unidentified ACI facilities to provide service in unidentified U S WEST
21 central offices and unidentified ACI "metro service centers." Id. These issues, and others in
22 ACI's narrative response at page 4, are encompassed in the Data Request 5 subparts.

23
24 ACI's plans are hardly in the nascent stage. See id. at 3. To the contrary, ACI has
25 through-out plans for entering this market and an immediate intent to do so. Given the
26

1 representations ACI makes regarding its plans and its intent to provide service in just a few
2 months, ACI should be ordered to produce all documents relating to any of these plans. The
3 Hearing Division should compel ACI to supplement its response and produce documents relating
4 to Data Request 5 of Attachment A.
5

6 **III. CONCLUSION**

7
8 For the foregoing reasons and those set forth in U S WEST's motion to compel, the Hearing
9 Division should compel ACI to supplement its Data Request responses as set forth in U S WEST's
10 motion to compel and compel ACI to produce all documents relating to its responses and
11 supplemental responses.

12 Respectfully submitted,

13
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